

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

| | | |
|--|---|--------------------|
| LARRY D. BROWN |) | |
| Claimant |) | |
| VS. |) | |
| |) | Docket No. 223,210 |
| BLACKBURN CONSTRUCTION |) | |
| Respondent |) | |
| AND |) | |
| |) | |
| UNITED STATES FIDELITY & GUARANTY CO. |) | |
| Insurance Carrier |) | |

ORDER

Respondent requests review of the preliminary hearing Order entered by Administrative Law Judge Nelsonna Potts Barnes dated June 25, 1997.

ISSUES

In its Application for Review, respondent lists the following issues for Appeals Board review:

“A. Whether the claimant suffered an accidental injury which arose out of and in the course of his employment?

“B. Whether timely notice was given?

“C. Whether the claimant established just cause for failing to provide notice within 10 days of the alleged accident on March 10, 1997?

“D. Whether the Administrative Law Judge exceeded her jurisdiction by ordering authorized medical treatment and TTD for the alleged work-related hernia?”

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the record and considering the briefs of the parties, the Appeals Board finds for purposes of preliminary hearing as follows:

The jurisdiction of the Appeals Board to review preliminary hearing orders entered pursuant to K.S.A. 1996 Supp. 44-534a is limited to issues involving the administrative law judge's jurisdiction in granting or denying the relief requested at the preliminary hearing. See K.S.A. 1996 Supp. 44-551(b)(2)(A). "A finding with regard to a disputed issue of whether the employee suffered an accidental injury, whether the injury arose out of and in the course of the employee's employment, whether notice is given or claim timely made, or whether certain defenses apply, shall be considered jurisdictional, and subject to review by the board." K.S.A. 1996 Supp. 44-534a(a)(2). Accordingly, the issues raised by respondent as to accidental injury arising out of and in the course of employment and notice of accident are subject to review on an appeal from a preliminary hearing order. The issue concerning medical treatment is not reviewable at this stage of the proceeding.

The Administrative Law Judge based her award of benefits upon a finding that although claimant failed to prove he gave notice of accident to the employer within 10 days, claimant established just cause for his failure to give said notice as required by K.S.A. 44-520. The Administrative Law Judge also decided the issues of injury by accident and whether the claimant's injury arose out of and in the course of his employment with respondent on the dates alleged. The issue of notice will be addressed first by the Board.

K.S.A. 44-520 provides:

"Notice of injury. Except as otherwise provided in this section, proceedings for compensation under the workers compensation act shall not be maintainable unless notice of the accident, stating the time and place and particulars thereof, and the name and address of the person injured, is given to the employer within 10 days after the date of the accident, except that actual knowledge of the accident by the employer or the employer's duly authorized agent shall render the giving of such notice unnecessary. The ten-day notice provided in this section shall not bar any proceeding for compensation under the workers compensation act if the claimant shows that a failure to notify under this section was due to just cause, except that in no event shall such a proceeding for compensation be maintained unless the notice required by this section is given to the employer within 75 days after the date of the accident unless (a) actual knowledge of the accident by the employer or the employer's duly authorized agent renders the giving of such notice unnecessary as provided in this section, (b) the employer was unavailable to receive such notice as provided in this section, or (c) the employee was physically unable to give such notice."

The Administrative Law Judge found claimant was injured on or about March 10, 1997. There is considerable doubt concerning the date of accident. However, for purposes of determining whether claimant gave timely notice of accident, the Appeals Board will adopt the date of accident alleged by claimant and as found by the Administrative Law Judge. It is agreed by the parties that notice was not given within 10 days in any case. The issue is whether just cause was established for the claimant's failure to give notice within 10 days. This issue turns primarily upon the question of whether the claimant's testimony that he was not sure what caused his hernia and did not believe his injury was serious until after seeking medical treatment constitutes just cause.

Claimant has been employed with respondent since February 2, 1997. Claimant testified he first noticed a bulge in his abdominal area about March 10, 1997. He was suspicious it might be a hernia but he wasn't sure. He first sought medical treatment on March 31, 1997, and reported the hernia to his employer that same day. According to claimant, he delayed seeking medical treatment until he became convinced the bulge would not go away. It was not until after he had a diagnosis that claimant determined he had suffered an injury by accident within the meaning of the Workers Compensation Act. Claimant admitted that when he reported the hernia condition to his foreman and supervisor that he was not sure whether the injury occurred at work or when it had occurred.

The March 31, 1997, office note of Robert Proctor, M.D., states that hernias are rarely identifiable as coming from a single episode or event. The history claimant gave to Dr. Proctor on March 31 was that he first noticed a bulge or discomfort about four to five weeks ago.

The Appeals Board finds claimant has not met his burden of proving just cause for his failure to give his employer notice of a work-related accident or injury within 10 days.

Claimant did give respondent notice within the 75 days which is the longest time period permitted by statute for the giving of notice where just cause has been established. The Administrative Law Judge found that just cause was shown for claimant's failure to give his employer notice of accident within 10 days. Presumably this was based upon claimant's failure to attribute his injury to any specific "accident" or traumatic event or events until sometime after he learned the diagnosis. However, claimant suspected his bulge was a hernia right away. Furthermore, he testified that he knew that if it was, in fact, a hernia that surgery would probably be required. Nevertheless, claimant waited until March 31 to impart this information to his employer. Thus, claimant had knowledge of a work-related injury within 10 days of its occurrence but did not communicate this information to his employer within 10 days as required by statute. Claimant was informed of this reporting requirement by the weekly safety meetings and by notices posted at the workplace. Claimant acknowledged that he knew he was to report accidents immediately and that he was required to go to a company-authorized doctor if injured at work.

The Appeals Board finds just cause has not been established. Accordingly, based upon the record as it currently exists, claimant has failed in his burden to prove timely notice was given pursuant to K.S.A. 44-520. The Order of the Administrative Law Judge should be reversed.

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the preliminary hearing Order entered by Administrative Law Judge Nelsonna Potts Barnes, dated June 25, 1997, should be, and the same is hereby, reversed.

IT IS SO ORDERED.

Dated this ____ day of September 1997.

BOARD MEMBER

c: Lawrence M. Gurney, Wichita, KS
Patricia A. Wohlford, Overland Park, KS
Nelsonna Potts Barnes, Administrative Law Judge
Philip S. Harness, Director